

THE UNIFORM DIVISION OF INCOME FOR TAX PURPOSES ACT

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The National Conference of Commissioners on Uniform State Laws¹ adopted the Uniform Division of Income for Tax Purposes Act at their annual meeting in New York City on July 12-13, 1957.² During the week following, it was presented to and approved by the House of Delegates of the American Bar Association.³ It is recommended to the several states for adoption. This proposed legislation is one of the latest additions to a rather distinguished series of Uniform Acts dating back to the Uniform Negotiable Instruments Act which was originally adopted by the Conference in 1896. A previous tentative committee draft of this new legislation, then known as the Uniform Allocation and Apportionment of Income Act,⁴ has been reviewed in a previous issue of this Journal.⁵ There the general nature and background of the problem of allocating and apportioning corporate net income for state and local tax purposes was considered; this article will be limited to comment on the provisions of the final version of the new Uniform Act which seeks to provide a legislative solution to the division of income problem.

Existing state and local income taxes frequently raise the question of what portion of the income of a corporation doing a multistate business is subject to income taxation in a particular levying state.⁶ This perennial problem of allocation and apportionment of income continues to receive attention.⁷ Moreover, several recent state tax study committee reports

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¹For general information on this organization see: COUNCIL OF STATE GOVERNMENTS: THE BOOK OF THE STATES, 1956-7, 14.

²Letter from Frances D. Jones, Executive Secretary, National Conference of Commissioners on Uniform State Laws, dated August 5, 1957; 21 TAX ADMINISTRATORS NEWS 91 (August 1957).

³2 AMERICAN BAR NEWS 3 (August 15, 1957).

⁴See Handbook of the National Conference of Commissioners on Uniform State Laws and Proc. of the Annual Conference Meeting in its sixty-fifth year, Dallas 1956 (Chicago, 1956) 89, 270.

⁵Lynn, *Formula Apportionment of Corporate Income for State Tax Purposes: Natura Non Facit Saltum*, 18 OHIO ST. L.J. 84 (1957).

⁶On OHIO REV. CODE §§718.01-718.03 dealing with the intermunicipal aspect of this problem, see Glander, *The Uniform Municipal Income Tax Act*, 18 OHIO ST. L.J. 489 (1957).

⁷Holt, *Interstate Allocation of Corporate Income*, PROC. NAT'L TAX ASS'N (1956) 167; discussion *Id.*, 172-175; Walsh, *Report of the Committee on Interstate Allocation of Business Income*, *Id.*, 336-337; Chwals, *The Uniform Apportionment Formula for State Income Taxes*, TAXES (March, 1955) 214.

have reemphasized the importance of particular allocation rules and apportionment formulae in terms of both tax revenues and their presumed impact on industry location decisions.⁸ The entire subject has been the occasion of much comment, study, criticism and confusion since 1911 when the State of Wisconsin adopted the first modern state net income tax.⁹ As long ago as 1928, the National Tax Association proposed a uniform law on this subject.¹⁰ It is gratifying to see a concrete development—the Uniform Division of Income for Tax Purposes Act—emerge after such a lengthy period of consideration.

Those interested in state tax uniformity will presumably regard adoption of the Uniform Act as a step forward. However, it would be somewhat optimistic to assume a rapid rate of adoption of the proposed law in view of conflicting economic interests and state fiscal inertia.¹¹ Jurisdictions, if any, newly adopting state corporate income taxes or corporate franchise taxes with an income measure of tax liability would be well advised to consider adoption of the Uniform Act; other jurisdictions considering modification of existing corporate income levies may be expected to approach adoption somewhat more gingerly. However this may be, the fact remains that in a national economy, uniform division of income for tax purposes is highly desirable on both fairness and compliance cost grounds.

PROVISION OF THE REVISED ACT

The final draft of the Uniform Division of Income for Tax Purposes Act contains twenty-two sections. Section one provides basic definitions. It constitutes something of a change from previous drafts of the act.¹² To clarify subsequent discussion, five sub-sections of

⁸REPORT OF THE TAX STUDY COMMISSION OF THE STATE OF NORTH CAROLINA, 6, 15 et seq., (1956); Carbert, *Corporate Tax Burdens in the Southeastern States*, A Report to the North Carolina Commission for the Study of the Revenue Structure of the State (1956); REPORT OF THE GOVERNOR'S MINNESOTA TAX STUDY COMMITTEE (1956) 303, 307-312.

⁹It is noteworthy that in 1911, Professor E.R.A. Seligman of Columbia University expressed the following opinion as to the future of state income taxation. While the prediction went awry, the premise upon which it was, in part, based continues to plague all concerned.

"What ever may be the future of tax reform in the American commonwealths, it is not likely that an income tax will be one of its permanent features. In the agricultural states, an income tax is not apt to succeed because farmers' incomes are proverbially refractory; in the developed industrial states an income tax is not apt to succeed because of the national scope of large business incomes." SELIGMAN, *THE INCOME TAX*, 429 (1911).

¹⁰PROC. NAT'L. TAX ASS'N. 428 et seq. (1928).

¹¹See Braden, *Cutting the Gordian Knot of Interstate Taxation*, 18 OHIO ST. L.J. 61, particularly 66-68 (1957).

¹²For example, the specific concept of the "principal income state", present in a previous draft, is absent in the final version of the act. See 18 OHIO ST. L.J. 100 (1957).

Section 1 are indicated below in full:

- (a) "Business Income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.
- (b) "Commercial domicile" means the principal place from which the trade or business is directed or managed.
- (c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.
- (e) "Non-business income" means all income other than business income.
- (g) "Sales" means all gross receipts of the taxpayer not allocated under sections 4 through 8 of this Act.¹³

Sections 2 and 3 provide that:

Any taxpayer having income from business activity which is taxable both within and without this state, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this Act.

For purposes of allocation and apportionment of income under this Act, a taxpayer is taxable in another state if (1) in that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

Thus, a taxpayer is "taxable in another state" if actually taxed in the ways indicated or if the state has jurisdiction to levy a net income tax applicable to taxpayer. This appears to provide that taxpayer is "taxable in another state" and hence subject to the Uniform Act in an adopting state if also doing business or domiciled in another state regardless of actual tax patterns. It is noteworthy that the first portion of the section includes both income and capital or net worth based taxes while the later part deals only with jurisdiction to levy a net income tax whether it be exercised or not.

ALLOCATION RULES

Section 4 provides for the allocation of non-business income including rents, royalties, capital gains, interest, dividends and patent or

¹³ The Commissioners' Comment on this sub-section which appears in the 1957 pamphlet copy of the Act is as follows:

"This definition is derived from the Model Unemployment Compensation Act which has been adopted in all states." Quotations from the Uniform Division of Income for Tax Purposes Act and the Commissioners' Comments thereon are made with NCCUSL permission which is gratefully acknowledged.

copyright royalties when such receipts constitute non-business income. Sections 5 through 8 contain specific allocation rules for these types of non-business income. Existing allocation patterns in the several states include rules for the specific assignment of income based on, among others, legal domicile, commercial domicile and business situs. The diversity in such allocation rules is considerable. It presumably gives rise to both overlapping taxation and the escape of some income from taxation.¹⁴

Allocation—Rents and Tangible Royalties

Section 5 provides a basis for the allocation of rents and royalties. Net rents and royalties from real property located within a state adopting the Uniform Act are allocable to that state. Net rents and royalties from tangible personal property are assigned to an adopting state on a two-fold basis, as follows:

(1) to the extent that such property is "utilized" in the adopting state or

(2) to the adopting state in their entirety if it is the state of the taxpayer's commercial domicile and taxpayer's legal domicile is not in the state of actual utilization or if taxpayer is not taxable in the state of utilization.¹⁵ Utilization is measured by applying a fraction to total rents and royalties. The fraction is:

Number of days of physical location in taxing state during
payment period in tax year.

Number of days of physical location everywhere during tax year.

The section further provides that, if the physical location of the property is not known or ascertainable for the time period in question, such property is "utilized" in the state where the property was located at the time the rental or royalty payer obtained possession.

This statement seems preferable to some existing rules which make an assignment of rents and royalties on the basis of the unqualified situs of property. It recognizes the potentiality of multiple situs and provides for ratio apportionment of the total. This appears to be reasonable and fair. Section 5 also illustrates a tendency running through much of the entire act—a tendency to assign income somewhere and if nowhere else then to the state of commercial domicile. This avoids the problem of rules that assign income to states in which the taxpayer is neither doing

¹⁴ For an excellent treatment, see Controllershship Foundation: Apportionment and Allocation Formulae and Factors Used by States in Levying Taxes Based on or Measured by Net Income of Manufacturing, Distributive and Extractive Corporations 8-13 (1954). This study has proved most useful in preparation of this commentary.

¹⁵ It will be recalled that the definition of commercial domicile contained in Section 1(b) contemplates only one commercial domicile.

business nor is taxable. This approach will doubtless commend itself to the domiciliary states; it can hardly appeal to all corporate taxpayers.

Allocation—Capital Gains

Section 6 provides for the allocation of capital gains and losses. Physical situs or business situs has been used as a basis for such determination; however, in some instances, such income has been included in that apportioned by statutory formula under some existing state tax patterns. The Uniform Act provides, quite appropriately, that capital gains and losses resulting from sales of real property located in the taxing state are allocated to it. Capital gains and losses from sales of tangible personal property are assigned to the taxing state if the property had a situs there at the time of sale *or* to the taxing state if it is taxpayer's commercial domicile and taxpayer is not taxable in the state where the property had a situs. Capital gains and losses from the sale of intangible property are assigned to the taxing state if it is the taxpayer's commercial domicile.

This section excludes capital gains and losses from income apportioned by formula and provides a basic rule for their specific allocation. If all jurisdictions adopted the Act, gains and losses from realty sales would be assigned to the state where the realty is located; tangible capital gains to the state of situs but if not taxable there to the state of commercial domicile. This rule affords another example of what may be termed the contingent shifting assignment tendency of the Act. Intangible capital gains are assigned to the state of commercial domicile.

Allocation—Interest and Dividends

Section 7 succinctly provides: "Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state." The act rejects business situs or other bases for specific allocation of such income items in favor of assigning them to the state of commercial domicile. This rule would apparently prevent a state adopting the Uniform Act from assigning to itself all the interest and dividends received by a domestic corporation or by a foreign corporation with an acquired commercial domicile and in addition assigning to itself such income of a foreign corporation without a commercial domicile on the basis of an in-state business situs of intangible personalty. This clear cut rule, if generally adopted, would considerably clarify the problem; its popularity is another matter.

Allocation—Patent and Copyright Royalties

Section 8 deals with the allocation of patent and copyright royalties. Such income is assigned to the taxing state to the extent of utilization therein; it is also allocated to the taxing state if that state is taxpayer's commercial domicile and to the extent that the patent or copyright royalties are utilized in a state where taxpayer is not taxable.

Section 8(b) and (c) specify how "utilization" is to be determined.

Section 8(b). A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

Section 8(c). A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which taxpayer's commercial domicile is located.

There might have been merit in a more detailed specification of the actual mechanics of utilization determination. Several alternative methods could be used to determine "the extent to which a patented product is produced in a state." Administrative regulations can clarify the matter or it can be left, as above, to whatever constitutes acceptable accounting procedure. One wonders if inclusion of a specific ratio would have been worthwhile. Nevertheless, the utilization concept appears to be a tenable basis for an allocation rule despite possible implemental difficulties.

The specific rules discussed above are provided for the allocation of non-business income. Some may argue the respective merits of legal domicile, commercial domicile, business situs or other bases for jurisdiction over source of income. Others may feel that certain of the above types of income are appropriate for inclusion in income subject to formula apportionment.

Despite such possible differences of opinion, Sections 4 through 8 of the Uniform Act would, if generally adopted, provide a uniform set of allocation rules. This would constitute a considerable improvement on the present situation. Only time and actual experience will tell whether the Act's apparent tendency to apply the maxim *mobilia sequuntur personam* in favor of taxpayer's commercial domiciliary state will be conducive to widespread adoption of this portion of the Uniform Act.

FORMULA APPORTIONMENT OF BUSINESS INCOME

Previous discussion of the Act herein has dealt with the allocation of given classes of non-business income. The second major subject included in the Uniform Division of Income for Tax Purposes Act is formula apportionment of business income. In general, there has been more difficulty and dissatisfaction with this problem than with allocation of non-business income even under the existing complex of situs and

domicile rules. Sections 9 through 17 cover the subject of formula apportionment. Section 9 provides that business income shall be apportioned by multiplying business income by the following fraction:

$$\frac{\text{Property factor plus payroll factor plus sales factor}}{3}$$

The above fraction is one version of the generally favored Massachusetts type formula. The important questions concern the definition of the three component factors.

Formula Apportionment—Property Factor

The property factor in the above three factor formula is defined and qualified in Sections 10, 11, and 12 of the Act. Section 10 sets up the following fraction:

$$\frac{\text{Average value of taxpayer's real and tangible personal property owned or rented and used in this state during the tax period}}{\text{Average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period}}$$

Section 11 provides for valuation of property in the fraction at its original cost. This definition avoids the difficulties that would arise if either current market value or *ad valorem* tax values were used. It also avoids the entire question of what type of depreciation allowance should be permitted by requiring the use of undepreciated cost. The previous draft act permitted deduction of "any depreciation or depletion permitted under the [tax law] of this state."¹⁶ Criticism of the draft suggested allowing any method of depreciation computation recognized under the Federal Internal Revenue Code. This suggestion, if adopted, would have granted taxpayers considerable latitude. The tentative solution in the draft act would have required either legislative or administrative determination of a particular method of depreciation computation. The Commissioner's drafting committee adopted a different approach and provided for undepreciated original cost as the valuation basis for the property factor in the formula.¹⁷ The decision is understandable and probably appropriate. However, in an age of inflation, original cost variations induced by differences in acquisition time may introduce possi-

¹⁶ Preliminary NCCUSL Committee Draft of a Uniform Allocation and Apportionment of Income Act, Sec. 12; Cf. 18 OHIO ST. L.J. 102 (1957).

¹⁷ The Commissioners' Comment under Section 11 in the 1957 pamphlet copy of the Act is as follows: "This section is admittedly arbitrary in using original cost rather than depreciated cost, and in valuing rented property as eight times the annual rental. This approach is justified because the act does not impose a tax, nor prescribe the depreciation allowable in computing the tax, but merely provides a basis for division of the taxable income among the several states. The use of original cost obviates any differences due to varying methods of depreciation, and has the advantage that the basic figure is readily ascertainable from

ble anomalies in apportionment as a result of this valuation rule. Section 11 also provides that rented property shall be valued at eight times the "net annual rental rate," which is defined as annual rent paid less amounts received from sub-rentals. While the 12½% capitalization rate may be considered high, there is precedent for it in the existing practice of some states.¹⁸ Moreover, it should be noted that this rate is applied to net rather than *gross* rentals as sometimes has been done.

Section 12 defines "average value of property" as an average of beginning and ending of tax period values. The tax administrator is permitted to require the averaging of monthly values of property "if reasonably required to reflect properly the average value of the taxpayer's property." This last phrase does not appear in the previous draft act. It may be intended to operate as a limit on the unilateral discretion of the tax administrator. *Quaere*, would it have been an improvement if the act required monthly averaging of property values and left to the tax administrators discretion the acceptability of an average of beginning and ending values? In many cases, availability of information would seem to be the controlling factor. The question might also be raised as to whether or not taxpayer should have the privilege of deciding the averaging period. This is a relatively minor point; it may be assumed that reasonable administrative practice will provide an acceptable solution.

Formula Apportionment—Payroll Factor

The payroll factor in the three factor apportionment formula is defined and delimited in Sections 13 and 14 of the Uniform Act. These two sections appear in the same form as in the previous NCCUSL Committee draft. Section 13 establishes the following fraction:

$$\frac{\text{Total amount paid in this state by taxpayer for compensation}}{\text{Total compensation paid everywhere by taxpayer}}$$

Section 14 details the meaning of the phrase "compensation is paid in this state." It is so paid if the services performed are entirely instate or if out of state services are "incidental" to instate services.¹⁹ The more difficult situations are dealt with in Section 14(c), as follows:

[Compensation is paid in this state if] (c) some of the service is performed in the state and (1) the base of operations or, if there is no base of operations, the place from which the

the taxpayer's books. No method of valuing the property would probably be universally acceptable."

The new Ohio legislation providing for uniformity in the levy of municipal income taxes takes a different approach. OHIO REV. CODE §718.02 provides for the use of "average net book value of the real and tangible personal property owned or used by the taxpayer" in a somewhat similar formula.

¹⁸ OHIO REV. CODE §718.02 (1953) also uses a rent multiplier of eight; it is applicable to the "annual rental" of real property.

¹⁹ Compare OHIO REV. CODE §718.02(A) (2).

service is directed or controlled is in the state, or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some of the service is performed, but the individual's residence is in this state.

In analysis of this factor, it should be noted that under existing tax patterns, most states define the numerator of the payroll factor in terms of either where the services are performed or the location of the home office. The numerator definition in the Uniform Act appears to be a compromise of the two existing practices. Compensation is assigned to the jurisdiction where the services are performed if there is no question of the need for proration in terms of time. If there is such a need, they are assigned in effect to the jurisdiction where the "home office" is located but if no part of the service is performed in the home office state then, to the state of the employee's residence. The Commissioners' Comment under Section 14 reads as follows:

This section is derived from the Model Unemployment Compensation Act. This is the same figure which will be used by taxpayers for unemployment compensation purposes.

The decision of the NCCUSL to frame the payroll factor definition so as to permit the use of generally available payroll data has obvious merit.

Formula Apportionment—Sales Factor

In most previous attempts at achieving uniformity in the apportionment of income for state tax purposes, the definition of the sales factor in the apportionment formula has been the source of controversy and conflict. It is perhaps the most difficult part of the entire problem to resolve in an equitable and acceptable fashion. The writer has discussed this problem elsewhere,²⁰ there seems little point in repetition here. The sales factor definition in the Uniform Act is given in Sections 15 through 17 which are quoted in their entirety in view of the crucial importance of the subject matter.²¹

Section 15. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

Section 16. Sales of tangible personal property are in this state if:

(a) the property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale; or

(b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (1) the purchaser is the United States government or (2) the taxpayer is not taxable in the state of the purchaser.

²⁰ 18 OHIO ST. L.J. 84, 98-99 (1957).

²¹ Compare OHIO REV. CODE §718.02(A) (3).

Section 17. Sales, other than sales of tangible personal property, are in this state if:

(a) the income-producing activity is performed in this state; or

(b) the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.²²

Before tentative appraisal of this sales factor definition, conflict in existing sales factor definitions should be noted. The four most general bases for assigning sales to the sales factor numerator of an apportionment formula are: (1) sales office location; (2) customer location or point of delivery; (3) location of goods sold at time shipped or appropriated to order; and (4) place where goods are manufactured or mined. Some jurisdictions, of course, combine, modify or limit these definitional bases. As indicated above, Section 16(a) of the Uniform Act assigns sales to the sales factor numerator of the state of delivery unless: (1) the buyer is the United States government, or (2) the taxpayer is not taxable in the purchaser's state. In either of which events, such sales are assigned to the state from which the goods were shipped.

The usual objection to formula assignment of sales to the state of destination is that this may result in apportioning sales to a state in which the seller is not doing business. Otherwise this approach has much in its favor; its conceptual simplicity is a distinct advantage; moreover, basic data are ordinarily available. The statement in Section 16(b) should be read in conjunction with Section 3 of the Act.²³ Considering these two sections together, it appears that taxpayer is "taxable" in the state of delivery if that state has jurisdiction to tax vendor's net income whether it does so or not, or if it does in fact levy a net income tax, a corporate franchise tax whether measured by net income or not, or a corporate stock tax, any of which are applicable to vendor. It would seem that "taxpayer is not taxable" in the state of the purchaser unless taxpayer is not doing business there. While in some cases he would not, the question of what constitutes either doing business or an acceptable local incident of interstate commerce is a story unto itself and will not be developed here.²⁴ It is enough to say that corporate taxpayers can hardly be expected to rejoice at a provision which purportedly attempts to insure that all sales will be included in the numerator of the sales factor of either

²² Sections 15-17 of the final version of the Act are identical with Sections 16-18 of the draft act with the exception that reference to the state of legal organization of the taxpayer is dropped from Section 16(b) (2) of the final version of the Act.

²³ *Supra*, p. 43.

²⁴ See e.g. Strecker, "Local Incidents" of Interstate Business, 18 OHIO ST. L.J. 69 (1957).

the state of destination or the state of origin of the goods sold.²⁵ Despite such possible lack of rejoicing, *certainty* has long been an important canon of taxation—particularly business taxation.²⁶ It may well be that the tax certainty potentially resultant from the Act's definition would be more beneficial to all concerned than the existing combination of tax overlapping and tax escape which results from present conflicts in sales factor definitions.

The treatment accorded sales to the United States government in Section 16(b) is unique, as far as the writer is aware. The Commissioner's Comment on Section 16 explains the matter as follows:

Sales to the United States Government are treated separately because they are not necessarily attributable to a market existing in the state to which the goods are originally shipped.

The reason stated in the comment appears logical; it is in accord with general statements on the theory of the sales factor in apportionment formulae. Usually, inclusion of the sales factor is designed to offset the tendency of the property and payroll factors to favor the state of origin or production. The sales factor indicates the contribution of the state of destination, which provides the market, to the generation of income. To the extent that sales to the United States do not reflect the existence of a market in the state of destination, the apparent theory of Section 16(b) seems proper. Sales to the federal government may be considered national in character; localization of such transactions is difficult. However, the sales factor definition in Section 16(b) does achieve such localization by assigning such sales to the factor numerator of the state of origin rather than that of the state of destination. This will increase the numerator of the sales factor of some taxpayers in predominately producer states. It may tend to offset objection to the provisions of Section 16(a). In view of the probable general interest in this particular provision, it is to be regretted that the Commissioners' Comment doesn't go into the matter in greater detail. Abstract speculation about the genesis of this provision had best be postponed until more information is available. It is to be hoped that future commentary will shed more light on this point.

With respect to apportionment of sales of other than tangible personal property, Section 17(a) assigns such sales to the taxing state if the income-producing activity is performed there. Section 17(b) deals with the situation where the income-producing activity is carried on both inside and outside the taxing state. In this case, such sales are assigned to the taxing state if a greater proportion of the income-producing activity occurs in that state than in any other. Costs of per-

²⁵ See comments of National Committee on State and Local Taxation, Controllers Institute of America, quoted at 18 OHIO ST. L.J. 96 (1957).

²⁶ SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS p. 778 (1776; Modern Lib. Ed.).

formance are to be used in making this determination. However, no exact method of determining such costs is prescribed in the act.

ADMINISTRATIVE RELIEF FROM FORMULA RIGIDITY

In many existing statutory apportionment formulae, there is provision for administrative relief when application of the formula would result in inequitable treatment of a particular taxpayer. This is necessary since almost any apportionment formula may cause anomalous results in some instances. Section 18 of the proposed Act provides such relief. It provides that if the allocation and apportionment provisions of the Act do not appropriately measure the business activity of the taxpayer in the taxing jurisdiction, the taxpayer may seek or the tax administrator may require adjustments in allocation and apportionment methods.²⁷ The relief methods stipulated include: (1) separate accounting; (2) exclusion of a factor or factors; (3) inclusion of an additional factor or factors; and (4) use of other methods to achieve equitable division of taxpayer's income. This provision in the proposed uniform act is fairly typical of similar provisions in existing laws. Such provisions, which depend upon administrative action in one state, can have only a rather limited effectiveness in promoting actual tax uniformity. However, they are by no means unnecessary, and few substantial objections can be raised to this provision. While excessive reliance upon administrative relief tends to result in taxation by *negotiation* rather than by legislative rule, such relief is apparently a necessary ingredient of the taxing process.

Section 19 simply requires that the act be construed so as to make the law of enacting states uniform. Section 20 contains the title—the Uniform Division of Income for Tax Purposes Act.

OVERVIEW

The foregoing commentary has been pedestrian if not prolix. Such an approach seems proper since this Uniform Act is new and has not as yet been generally discussed in terms of specific provisions. It has not been adopted in any jurisdiction; accordingly, this article is a mere proslution. Definitive evaluation must await the acid test of experience after some state adopts this proposed legislation. A few preliminary comments are nevertheless appropriate.

There can be little doubt that the existing pattern of allocation and apportionment rules in the several states leaves much to be desired. There

²⁷ The Commissioner's Comment under Section 18 explains the absence of procedural provisions as follows:

"It is anticipated that this act will be made a part of the income tax acts of the several states. For that reason, this section does not spell out the procedure to be followed in the event of a disagreement between the taxpayer and the tax administrator. The income tax acts of each state presumably outline the procedure to be followed."

also is no reason to suppose that any proposed uniform legislation on this subject will commend itself as the perfect answer to the problem to all taxpayers and tax administrators. Both groups have a basic identity of interest in tax certainty and in compliance and administrative cost minimization. There is also a basic conflict of interest with respect to protection of the revenue, on the one hand, and minimization of tax burden on the other. If the problem of achieving equity and reasonable certainty in state taxation of multistate business is to be solved, compromise is required. Other avenues to a solution of the problem, such as Congressional regulation of state taxing authority, have had little apparent attraction for either corporate taxpayers or state tax administrators.

The proposed Uniform Division of Income for Tax Purposes Act, carrying the endorsement of both the National Conference of Commissioners on Uniform State Laws and the American Bar Association, should provide a basis for an acceptable compromise. If, in the years ahead, it is generally adopted by those states levying a state corporate net income tax or a corporate franchise tax with an income measure of tax liability, existing allocation and apportionment problems if not solved, should be, minimized. Given an interdependent national market economy and a federal type of governmental organization, perhaps this is as much as can be expected from uniform state legislation.

The new Uniform Act is noteworthy in several respects. These include the priority given destination in the sales factor, the shifting assignment of sales, separate treatment of sales of tangible personal property and other income and the use of original cost in the property factor. Not all will agree with the definitions selected by the NCCUSL; most will agree, I think, that the new Uniform Act constitutes a major forward step. Given legislative acceptance, it provides a potential solution to what has been an intractable problem in state and local taxation for many years. Perfect solutions are seldom to be found in tax policy questions; in most cases adequate solutions are the best that can be devised. The new Uniform Division of Income for Tax Purposes Act appears to provide one of these. Only time will tell whether the act has the legislative acceptability that will permit actual use of the particular solution offered to the States by the NCCUSL.